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IN THE

Supreme Court of the United States

October Term, 1957

No. 961

MAX OSSLO, ARTHUR MEYER, CHESTER D. HAZEL, LOUIS J. CACIO, PAUL E. DEMPSTER, JERRY L. DIMITRATOS and CHARLES A. TUCKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

Petitioners, together with appellant McFaden, were charged with conspiracy to commit the crime of assault and with assault by means of force likely to produce great bodily injury. A jury found them guilty as charged. Their motions for a new trial were denied. With the exception of petitioners Osslo and Meyer, and appellant McFaden, petitioners were sentenced to imprisonment in the state prison. Probation was granted to Osslo (as well as McFaden) for ten years with the provisions that he be confined for the first six months of said period in the Adult Detention Facility of San Diego County; that he

pay a fine of $1,500.00 at the rate of $50.00 a month from his own funds; that during the probationary period he not hold any position elective or appointive in or receive any remuneration from any union; and that the particular court and judge would retain jurisdiction of the matter throughout said period and no other department of the court or other judge should modify the order without notice to the trial judge. Probation was granted to Meyer on similar conditions except that in his case the period of confinement was set at three months and the fine imposed was $750.00. (See Majority Opinion, California Supreme Court, *People v. Osslo*, 50 A. C. 1, 8, 28-29, 323 P. 2d 397, 399, 412-413; Opinion of District Court of Appeal, 150 A. C. A. 933, 935-936, 310 P. 2d 1020, 1021-1022.)

On May 13, 1957 the District Court of Appeal, Fourth District, affirmed the judgments and orders denying motions for new trial. A hearing was granted by the California Supreme Court and on March 26, 1958 the majority of said court affirmed the conviction, with one modification, namely striking from the orders granting probation the provisions whereby the particular judge purported to retain jurisdiction of the cause. Petition for rehearing was denied and on April 28, 1958 the said court, with one justice dissenting, denied application for stay of execution of judgments.

Jurisdiction.

In seeking a petition for writ of certiorari, petitioners contend that they were denied due process of law and that in certain respects cruel and unusual punishment was imposed.

Summary of Argument.

Petitioners contend they were denied a fair trial in violation of due process requirements in that the case was intentionally channeled into a particular court, that they were convicted in violation of the due process requirement in that their conviction was based solely upon inferences, and that the conditions of probation as to Osslo and Meyer constitute imposition of cruel and unusual punishment.

Respondent maintains that the evidence was sufficient, that the case was not intentionally channeled, and that there was no impropriety in the conditions of probation as affirmed by the majority of the California Supreme Court. It is submitted that petitioners received a fair trial in conformity with state procedure and that said conditions of probation are within the legitimate province of the court to impose and that their imposition is in conformity with state procedure.

Statement of the Facts.

With respect to the facts of the offenses charged, respondent incorporates by reference the opinion of the majority of the California Supreme Court, 50 A. C. 1, 8-20, 323 P. 2d 397, 399-408. Said facts are epitomized below in Point II of the Argument.

ARGUMENT.

I.

No Substantial Federal Question Is Presented Under Petitioners' Contention That the Case Was Intentionally Challenged Into a Particular Court.

As one of the points in their Petition for Certiorari, petitioners argue to the effect that certain proceedings prior to trial clearly indicated that under no condition was the case to be heard in any other court than that of the judge who presided over the trial, and that the policy of the preference statutes with respect to criminal matters was disregarded. (Petition for Certiorari, pp. 10-15.)

Petitioners' contentions are cogently answered by the majority opinion of the California Supreme Court as follows:

> "*The Asserted Channeling of the Case into a Particular Department.* By stipulation this case was set for trial on July 9, 1956. All proceedings up to and including the making of the stipulation were had in Department 4 (Judge John A. Hewicker). The minutes of Department 4 show that on July 9 the cause was transferred to Department 2 (Presiding Judge Turrentine) for trial. Actually, the reporter's transcript shows, the transfer was for the purpose of selecting a jury only. The reporter's transcript further shows that, as already indicated, defense counsel refused to accede to the procedure of having a jury selected in Department 2 while the trial then pending in Department 4 was being completed and then having the cause transferred to Department 4 for completion of trial. Defense counsel moved that the cause be assigned to any available department for immediate trial. The court stated, 'Motion granted, and the first court available will be Judge

Hewicker, the regular criminal department. . . . [T]he case will be continued until two o'clock at which time the defendants, and all attorneys, and the jury is asked to return. If we are not ready then, why we will have to have continuances half a day at a time until we have a court available to try this case. I can't tell you exactly when that will be, but the case in Judge Hewicker's court may terminate at any moment . . . or it may take the rest of the week, but there is no alternative to that procedure . . .' Defense counsel objected to the continuance 'on the ground that there are courts available and that there is going to be a civil trial to be started in one of the Superior Courts this morning, and a criminal case has precedence over a criminal [sic] case.' The court said, 'Objection overruled.'

"The cause was continued two or three times each day until July 16 when selection of a jury began in Department 4 before Judge Hewicker. On numerous occasions defense counsel objected to the continuances, pointed out that civil cases were commenced in other departments and that a jury had been selected in another department to try a criminal case which was originally set for trial later than defendants' case, and urged that the continuances were 'part of the plan to channel a case into a particular court.'

"Judge Turrentine, in overruling one of defense counsel's objections to a continuance, explained at some length the reasons for the continuances. He said that 'the case was originally pending in that Department [4] and was to go to trial there and it was only sent to this Department by Judge Hewicker for the purpose of getting a jury to try the case. . . . [I]n view of the objection to me trying—to me selecting a jury the only thing that could logically happen would be that it would go back to the Depart-

ment where it originated and should be because Department 4 is the Presiding Criminal Department, and I am complying with the suggestion and request of Judge Hewicker.'

"Judge Turrentine further stated that the selection of a jury by a department other than the one in which the case was to be tried 'is almost routine in this County. So we assumed . . . that on July 9th we would proceed in this Department to select the jury in order to give you a speedy trial and this was done at the request and suggestion of Judge Hewicker. It necessitated a very considerable rearrangement of business in this County to do it. We have four regular judges either away or assigned to duty on the District Court of Appeal, and, of course, we have the rather long trial in Department 4 going on. It is our general policy in criminal cases to give preference to the trial of those criminals who are incarcerated in jail so if they are deprived of their liberty unlawfully they may have their day in court and get out in preference to those who have the financial means to make bail . . . [Defendants were at liberty on bail.] If it were not for the fact that we had members of the San Diego County Bar who were willing to serve as judges pro tem. without compensation to themselves we would just simply be bogged down with nothing but a number of these short jury trials where the defendants are in jail awaiting trial.'

"The judge went on to explain the condition of the calendar in various departments, pointing out that a jury trial of a person confined as mentally ill was being had in one department, that the juvenile calendar was 'very congested,' and that 'today we have three criminal trials going on out of five regular judges, one regular and two pro tems . . .'

"Defendants contend that the continuance of the case after the date set for trial, when civil cases were being tried in other departments, was in violation of section 681a of the Penal Code ('The welfare of the people of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice') and the provision of section 1050 of that code that 'Criminal cases shall be given precedence over all civil matters and proceedings.'

"It does not appear that the policy of sections 681a and 1050 was disregarded. Judge Turrentine's explanation of the condition of the calendar shows that defendants were not being deprived of precedence over civil cases for any arbitrary reason and that the continuances to enable trial in Department 4 were not made for the purpose of improperly channeling the case into that department. Rather, it appears that the orderly administration of a crowded calendar required the continuances to enable trial of the case in a proper department. The precedence to which criminal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned. And certainly it does not appear, as defendants suggest, that the 'channeling' of this cause to Department 4, where it had been from its inception, was an improper channeling to a particular judge as an individual rather than as the judge of the presiding criminal department."

People v. Osslo, 50 A. C. 1, 29-31, 323 P. 2d 397, 413-415.

II.

No Substantial Federal Question Is Presented Under Petitioners' Contention to the Effect That the Conviction Was Based Upon Insufficient Evidence.

In substance, petitioners contend that the affirmance of the judgment was based upon unwarranted inferences. (Petition for Certiorari, pp. 15-19.)

We submit that the evidence of guilt was substantial. Viewed in the light most favorable to the people, the record reflects that a jurisdictional dispute arose between the local Butchers' Union in San Diego and that of the local Retail Clerks; that appellant Osslo, Secretary-Treasurer of the Butchers' Local, asserted he was "boss of the West Coast" and would fight for the jurisdiction; that appellant Osslo secured the services of the five "sailor" appellants from San Francisco through the Sailor's Union of the Pacific, ostensibly to accompany and protect the Butchers' Local business agents, appellants McFaden and Meyer; that the five were in contact with appellants Osslo, McFaden and Meyer subsequent to their arrival in San Diego; that the five were on the payroll of the Butchers' Local; that the five accompanied appellants McFaden and Meyer to various markets in the San Diego area on the day in question; that the five acted in concert at one market in a sudden, unprovoked and brutal assault upon a retail clerk, following a visit inside this market earlier that same day by appellants McFaden, Meyer, and some of the five; that appellants McFaden and Meyer also entered and went out of the market with five; that the

five and appellant Meyer made false statements to the police relating to the matter in question, and that there were other circumstances connecting appellants Osslo, McFaden, and Meyer with the activities of the five. (*People v. Osslo*, 50 A. C. 1, 8-20, 323 P. 2d 397, 399-408.) As the majority of the California Supreme Court concluded:

> "It is a reasonable inference that Osslo, McFaden, and Meyer, who had been actively and extensively engaged in union affairs, knew of such participation and assault and battery. Pretending concern for their own safety, but never asking police protection, Osslo, with the assent and aid of McFaden and Meyer, set up a situation which inferentially was designed to, and which clearly did, increase the likelihood of violence in the jurisdictional dispute. On a view of the evidence favorable to the prosecution, which the law at this stage of the proceeding requires of us, it is fairly inferrible that Osslo, McFaden, and Meyer at least tacitly understood, anticipated, and agreed that the remaining five defendants would not merely be present to act as 'observers' and protect the Butchers from violence, but would and should initiate the violence, which they subsequently did initiate, to 'show' the Clerks that Osslo indeed 'was boss of the West Coast and he would fight for jurisdiction' and 'that was it.'" (*People v. Osslo*, 50 A. C. 1, 20, 323 P. 2d 397, 408.)

The conclusions reached by the majority of the California Supreme Court are in conformity with the settled rule on appeal in California, as follows:

> ". . . 'The rule applicable where there is evidence, circumstantial or otherwise, that a crime has

been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal "will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground" of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. . . . We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.' (People v. Daugherty (1953), 40 Cal. 2d 876, 885 [256 P. 2d 911].)" (*People v. Osslo,* 50 A. C. 1, 10, 323 P. 2d 397, 400-401.)

III.

No Substantial Federal Question Is Presented Under Petitioners' Contention That the Conditions of Probation as to Osslo and Meyer Constitute the Imposition of a Cruel and Unusual Punishment.

Petitioners contend in substance that the terms of probation are disproportionate to the charges against petitioners Osslo and Meyer. (Petition for Certiorari, pp. 19-25.)

In California the applicable statute with respect to terms of probation is Penal Code Section 1203.1 providing in pertinent part as follows:

> ". . . The court, judge or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine. The court, judge or justice, in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; provided, however, that where the maximum possible term of such sentence is three years or less, then such period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over three years; may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither; may provide for reparation in proper cases; and may require bonds for the faithful observance and performance of any or all of the conditions of probation. . . .
>
> "The court may impose and require any or all of the above-mentioned terms of imprisonment, fine and

> conditions and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer, that should the probationer violate any of the terms or conditions imposed by the court in the instant matter, it shall have authority to modify and change any and all such terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of the public offense involved. . . ."

The petitioners in question were found guilty of assault as specified in Penal Code Section 245 for which the maximum punishment is imprisonment in the state prison not exceeding ten years. Each fine imposed was less than the $5000 maximum specified in Penal Code Section 245 and Section 182 (the former section dealing with assault and the latter dealing with conspiracy, under which appellants were found guilty). Accordingly the periods of probation and of detention and the fines are proper.

As is stated in the majority opinion of the California Supreme Court:

> "Defendants argue that the conditions of probation exceeded the trial judge's power by reason of the provision that defendants Osslo, McFadden, and Meyer shall not, during the 10-year probationary period, hold any union position or receive remuneration from any union. However, since it could be and presumably was found that these defendants are guilty of crimes growing out of union activities, it appears not improper that restrictions be placed upon such activities as a condition of probation.

"The granting of probation is entirely within the sound discretion of the trial court: a defendant has no right to probation: he does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence. (People v. Frank (1949), 94 Cal. App. 2d 740, 741-742 [211 P. 2d 350].) In the Frank case the defendant, a pediatrician, was convicted of contributing to the delinquency of a minor by a lewd act committed on a child in a plaster cast. It was held proper that the terms of his probation include the requirement that defendant not practice medicine during the five years he was on probation. The court specifically rejected the argument, similar to the argument of defendants Osslo, McFaden, and Meyer here, that the condition of probation was unreasonable and beyond the power of the court."

People v. Osslo, 50 A. C. 1, 28, 323 P. 2d 397, 412-413.

Conclusion.

This concludes our opposition to the petition for writ of certiorari. In light of the majority opinion of the California Supreme Court, we submit that no substantial federal question is presented as would justify the granting of the petition for certiorari.

Wherefore, we respectfully request that the petition be denied.

Respectfully submitted,

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